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In the Supreme Court of the United States

OCTOBER TERM, 1954

No. —.

HERBERT BROWNELL, JR., INDIVIDUALLY AS THE ATTORNEY GENERAL OF THE UNITED STATES AND WILLIAM P. ROGERS INDIVIDUALLY AS DEPUTY ATTORNEY GENERAL OF THE UNITED STATES, PETITIONERS

v.

LEO A. ROTH

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

The Solicitor General, on behalf of Herbert Brownell, Jr., individually as the Attorney General of the United States, and William P. Rogers, individually as the Deputy Attorney General of the United States, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, entered on July 16, 1954.

OPINIONS BELOW

The memorandum decision of the United States District Court for the District of Columbia (R. 41-

47) is reported at 117 F. Supp. 362. The opinion of the Court of Appeals Appendix A, *infra,* pp. 1A-5A has not yet been reported.

JURISDICTION

The judgment of the Court of Appeals was entered on July 16, 1954, *infra,* p. 5A. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Lloyd-LaFollette Act, which provides that an employee in the classified civil service shall not be dismissed summarily by an officer of the United States, limits the power of the President to except particular positions or types of positions from that service.

2. If not, whether the pertinent Executive Orders (No. 9830, February 24, 1947, and No. 10463, June 25, 1953) removed respondent's position as an attorney from the classified civil service and made him subject to summary discharge.

STATUTES AND REGULATIONS INVOLVED

The pertinent provisions of the Lloyd-LaFollette Act of August 24, 1912, as amended (37 Stat. 555; 62 Stat. 354, 5 U. S. C. 652) and the pertinent parts of Executive Orders 9830 of February 24, 1947 (12 F. R. 1259), and 10463 of June 25, 1953 (18 F. R. 3655), are set forth in Appendix B *infra,* pp. 6A-10A.

STATEMENT

The basic problem involved in this petition is the effect of a series of Executive Orders upon the

civil service rights under the Lloyd-Follette Act of non-veteran government lawyers or, conversely, the impact of that Act upon the President's power to except positions from the competitive civil service.[1] Presentation of the issues will be facilitated by a brief outline of the pertinent Orders, preliminary to a statement of the particular facts bearing on respondent's discharge.

a. *Attorneys and the competitive civil service.* In apparent recognition of the fact that the aptitude of a person to perform the duties and functions of a government attorney cannot be effectively determined by the customary type of civil service examination,[2] attorneys' positions in the United States government service were excepted at least as early as 1903 from the requirement of competitive examinations.[3] Beginning in 1938,

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[1] The pertinent parts of the Lloyd-LaFollette Act (*infra*, pp. 6a-7a) provide that no person in the classified civil service of the United States shall be removed except for such cause as will promote the efficiency of the service and for reasons given in writing. In case of a removal, the employee must be given notice of the charges, furnished with a copy thereof, given a reasonable time to answer them, and be furnished with a written decision. In short, the Lloyd-LaFollette Act protects employees coming within its scope from summary or arbitrary dismissal.

[2] See, *e.g.*, Report of President's Committee on Civil Service Improvement, H. Doc. No. 118, 77th Cong., 1st Sess. (hereafter referred to as H. Doc. No. 118) p. 31.

[3] Civil Service Rules of March 20, 1903, Schedule A, 20th Report of the Civil Service Commission 42, 62. See also 30 Op. A. G. 181, 182. See also Executive Order of November 2, 1896, 18th Report of the Civil Service Commission 279, 280, exempting from the requirement of examinations "attorneys or assistant attorneys * * * whose main duties are connected

there were a number of new attempts to meet the problem of qualifying professional personnel. Executive Order 7916 of June 24, 1938, 3 F. R. 1526, scheduled to take effect on February 1, 1939, was designed to subject virtually all non-policy-making government positions—including attorneys' positions—to the requirement of competitive examinations. On January 31, 1939, however, Executive Order 8044 (4 F. R. 497) suspended Executive Order 7916 with respect to professional and scientific positions and appointed a committee, commonly referred to as the "Reed Committee", to "make a comprehensive study of methods of recruiting, testing, * * * personnel for the positions to which this order relates * * *."

The Reed Committee submitted its report in February 1941.[4] In the meantime, Title I of the Ramspeck Act of November 26, 1940 (54 Stat. 1211, 5 U.S.C. 631a, 631b), had authorized the President to cover into the classified civil service any office or position in or under the executive department. Executive Order 8743 of April 23, 1941 (6 F.R. 2117), created a Board of Legal Examiners charged with the duty "to promote the development of a merit system for the recruitment, selection, appointment, promotion, and transfer of attorneys in the classified civil service." Pursuant

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with the management of cases in court." Until superseded by the Civil Service Rules of May 6, 1896 (18th Report of the Civil Service Commission 269), Rule XIX of the original Civil Service Rules of May 7, 1883 (18th Report of the Civil Service Commission 163, 167) had excepted "persons whose employment is exclusively professional."

[4] See H. Doc. No. 118, *supra*, p. 3, fn. 2.

to this Order, persons holding attorney positions could acquire classified civil service status by taking a non-competitive examination prescribed by the Civil Service Commission with the approval of the Board of Legal Examiners.

Congress, however, refused to appropriate funds for the continued operation of the Board of Legal Examiners or of its successor, the Legal Examining Unit in the Civil Service Commission.[5] This in effect prohibited civil service examinations for attorney positions.[6] As a result, President Truman issued Executive Order 9830 of February 24, 1947, 12 F. R. 1259 (*infra*, pp. 7A-10A), which again excepted attorneys' positions from the competitive service and restored them to Schedule A, in which

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[5] In 1942 the House approved an appropriation of funds for the Board of Legal Examiners in the Independent Offices Appropriation Act, 1943 (56 Stat. 392, 396), only on an understanding that appropriations for future years would be dependent upon the passage of a substantive law authorizing the Board (88 Cong. Rec. 5441-52). In 1943 a bill authorizing the Board of Legal Examiners was passed by the House (89 Cong. Rec. 3565) but not by the Senate (90 Cong. Rec. 2662). In the Independent Offices Appropriation Act for the fiscal year 1944 and for each year thereafter Congress had expressly prohibited the use of funds for operation of the Board of Legal Examiners or its successor, the Legal Examining Unit in the Civil Service Commission, established pursuant to Executive Order 9358 (July 1, 1943, 8 F. R. 9175). 57 Stat. 169, 173; 58 Stat. 361, 364; 59 Stat. 106, 109; 60 Stat, 60, 63; 61 Stat. 585, 590; 62 Stat. 176, 180; 63 Stat. 631, 635; 64 Stat. 697, 701; 65 Stat. 268, 271; 66 Stat. 393, 397; 67 Stat. 298, 300. See also H. Rep. 109, 78th Cong., 1st Sess., p. 6; H. Rep. 1023, 78th Cong., 2d Sess., pp. 5-6; S. Rep. 730, 78th Cong., 2d Sess., p. 7; H. Rep. 1642, 78th Cong., 2d Sess.; 90 Cong. Rec. 2659-62.

[6] Civil Service Commission Departmental Circular No. 497, Supp. No. 2 (R. 39-40).

they had been listed before 1941 (§ 6.4, *infra*, p. 9A). The Order, however, gave incumbents continued protection against summary removal, providing that where a position in Schedule A was occupied by an attorney who had acquired competitive status as the result of the 1941 Order, he could be separated only pursuant to the Civil Service Rules and Regulations (§ 6.1(f), *infra*, pp. 8A-9A). Executive Order 10463 of June 25, 1953, 18 F. R. 3655 (*infra*, p. 10A), withdrew this reservation by directing that apart from the protection afforded by the Veterans' Preference Act removals from positions in Schedule A were not to be governed by Civil Service Rules and Regulations.[7]

b. *Respondent's positions in the government service and his removal.* Respondent joined the government service as an attorney in 1938 (R. 2, 31). On April 15, 1943, he was accorded civil service status under Executive Order 8743 of April 23, 1941 (*supra*, pp. 4-5) (R. 10-11, 31). He is

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[7] Executive Order 10440 of March 31, 1953, 18 F. R. 1823, had amended Section 6.1(f) to the effect that the Civil Service Rules and Regulations were not to apply to removals from positions listed in Schedule C (confidential and policy-making) while they continued to apply to removals from Schedules A and B, and renumbered it Section 6.4. Executive Order 10463 excepted positions in Schedules A and C from the application of the Civil Service Rules governing removals but continued this protection for Schedule B positions (obtained by non-competitive examinations).

A letter from the Chairman of the Civil Service Commission to the President submitting the draft of the Executive Order for approval stated, "Under this amendment the Civil Service Rules and Regulations will no longer apply to removals from positions listed in Schedule A of persons who have competitive status" (R. 35).

not a veteran. As we have shown above, Executive Order 9830 restored attorneys' positions to Schedule A in 1947, and Executive Order 10463, dated June 25, 1953 (*supra*, pp. 5-6), authorized the summary removal of government employees holding positions in Schedule A even if they held civil service status. On June 29, 1953, petitioners, the Attorney General and the Deputy Attorney General, advised the respondent that his employment in the Department of Justice would be terminated as of July 31, 1953 (R. 18). This action was taken because petitioners were of the opinion that respondent lacked the qualifications necessary for employment in the Department of Justice (R. 17-18, 34). Petitioners did not comply with the procedural requirements of the Lloyd-LaFollette Act (*supra*, p. 3, fn. 1) because they do not consider the Act, limited in its terms to persons in "the classified civil service of the United States," to be applicable to the removal of an employee from an excepted (Schedule A) position, even if he, personally, had civil service status.

Upon respondent's appeal to the Civil Service Commission, the Commission originally took the position that Executive Order 9830, returning attorneys' positions to Schedule A, did not affect the protection under the Lloyd-LaFollette Act of attorneys with civil service status who had served in attorneys' positions prior to May 1, 1947 (R. 20-21; see also R. 27-32).[8] Petitioners did not follow

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[8] After the decision of the District Court, the Civil Service Commission adopted the position taken by petitioners and

the recommendations of the Civil Service Commission (R. 21-22). Respondent then brought suit.

c. *The proceedings below.* The District Court[9] dismissed the complaint (R. 41-47). It held that respondent ceased to be in the "classified civil service," which alone entitles an incumbent to the protection of the Lloyd-LaFollette Act,[10] on May 1, 1947, when Executive Order 9830 placed attorneys' positions in Schedule A, and that there is nothing in the Lloyd-LaFollette Act limiting the general power of the President to include or except positions from the civil service. It also held that the President had the power to provide in Executive Order 10463 (*supra,* p. 6) that the Lloyd-LaFollette Act procedures need not be followed in the case of separations from excepted positions in Schedule A, even if the employee had competitive status. The Court of Appeals reversed (*infra,* pp. 1A-4A). It suggested that Executive Order 9830, issued in 1947, was not intended to apply to attorneys who at that time were already in the

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ruled that the provisions of the Lloyd-LaFollette Act do not apply to any employees holding Schedule A positions. See *infra,* pp. 23-24.

[9] The controversy is one arising under the laws of the United States and the jurisdiction of the District Court is apparently based on 28 U.S.C. 1331. The complaint, however, does not allege expressly that the matter in controversy exceeds the sum or value of $3,000.

[10] An employee is in the "classified civil service" if he meets two requirements. First, he must have competitive status, and, second, he must occupy a classified position. *Bailey* v. *Richardson,* 182 F. 2d 46, 53 (C.A. D.C.), affirmed by an evenly-divided Court, 341 U. S. 918.

classified civil service. It based its decision, however, on the far broader ground that the 1947 Executive Order could not have affected respondent, for, if it had, it would have "removed" him from the classified civil service without compliance with the procedural requirements of the Lloyd-LaFollette Act. In short, the Court of Appeals construed the Lloyd-LaFollette Act as a limitation upon the power of the President to except positions from the operation of the civil service laws.

REASONS FOR THE ALLOWANCE OF THE WRIT

The decision below holds that the Lloyd-LaFollette Act constitutes a limitation upon the "President's otherwise plenary control over appointments and removal" (*infra,* p. 4A), preventing him from excepting from the classified civil service those positions which are occupied by persons having competitive civil service status. The decision cannot be limited to a mere holding that Executive Order 9830 was not intended to apply to persons in respondent's position, for the restrictive interpretation of the Executive Order adopted by the Court of Appeals is premised upon the ground that the President lacks the authority to declassify positions occupied by incumbents who, personally, have status. Cf. R. 29-30.

The upshot of the decision is that once a position has been placed in the classified civil service, the incumbent acquires permanent tenure subject only to the possibility of removal for cause upon stated charges. Under the holding, it is immaterial that the President has determined that the position is

one which has a confidential or policy-determining character. Palpably, the decision has a significance which goes far beyond the particular facts of the individual case. It places a broad limitation upon the capacity of the Chief Executive to manage the federal establishment in the manner which he believes will best promote effective administration.

It is petitioners' view that the Court of Appeals erred in its construction of the Lloyd-LaFollette Act, and that the Act was not intended to restrict the traditional power of the President, dating back to 1871, to cover positions into the civil service or to except them from it. The Act, by its terms, was designed to prevent an "officer or employee" of the United States from removing summarily a subordinate employee occupying a position in the classified civil service. It does not follow that the Act was intended to limit the President's power to determine whether particular positions or types of positions are of such character that they should be included or continued in the classified civil service. The language of the statute and its legislative history, as well as the historical development of other enactments and regulations relating to the classified civil service, point to a contrary conclusion.

1. *The Lloyd-LaFollette Act does not constitute a limitation upon the President's power to classify and declassify civil service positions.*

The Lloyd-LaFollette Act (*infra*, pp. 6A-7A) provides in substance that no person *in the classi-*

fied civil service of the United States shall be removed unless (1) he has notice of the charges preferred against him, (2) he is furnished with a copy of such charges, (3) he is allowed a reasonable time to answer those charges, and (4) he is furnished with a written decision. This procedure was not followed at the time of respondent's discharge because, as petitioners construed the statute and executive orders, respondent was not then in the classified civil service of the United States.

In order to be in the classified civil service of the United States, an employee must meet two conditions. First, he must occupy a position in the competitive civil service, *i.e.*, a civilian position in the executive branch which is not excepted, and, second, he must have competitive status. Civil Service Rule I, 5 C. F. R. 1.1. *Bailey* v. *Richardson*, 182 F. 2d 46, 53 (C. A. D. C.), affirmed by an equally divided Court, 341 U. S. 918; see also *Deviny* v. *Campbell*, 194 F. 2d 876, 880 (C. A. D. C.), certiorari denied, 344 U. S. 826.

There is no dispute that respondent acquired competitive status in 1943 by virtue of a non-competitive examination (R. 10-11), and that he held that *status* at the time of his separation.[11] At that time, however, his *position*, having been excepted and placed in Schedule A, in 1947, by Executive

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[11] Just as the coverage of a position into the competitive civil service does not automatically give the incumbent competitive status, the exception of a position has no bearing on the competitive status of the employee then occupying it. 34 Op. A. G. 192; 40 Op. A. G. 440.

Order 9830, was no longer in the competitive service. Accordingly, respondent was not in the "classified civil service" at the time of his dismissal, and petitioners did not have to comply with the Lloyd-LaFollette Act procedures.

As the court below stated, a person in the classified civil service of the United States can be "removed therefrom" in two ways, either by action of the department head, *i.e.*, a dismissal from office, or by action of the President placing his position in the excepted schedules (a step which may or may not be followed by an actual separation).

The language of the Lloyd-LaFollette Act and the circumstances of its enactment show that the Act was directed only at the actual discharge of an employee from his office and not at the reclassification of his position by the President. The command of the Act addresses itself to "the officer or employee directing the removal or suspension without pay." The President is not an "officer or employee of the United States,"[12] and legislative debate plainly establishes that this term was intended to refer to the department heads as the persons having the power of removal (48 Cong. Rec. 10804). Moreover, there is nothing in the legislative history indicating that the Act, in addition to its imposition of procedural requirements upon removals by department heads, sought to limit the power of the President to reclassify the Civil Service.

The Lloyd-LaFollette Act, Section 6 of the

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[12] U. S. Constitution, Art. II, Section 2; *Steele* v. *United States*, 267 U. S. 505, 507.

Postal Appropriations Act of 1912, was enacted to remedy a number of grievances which had arisen in the Civil Service system. The first arose from the imposition by Presidents Roosevelt and Taft of a so-called "gag rule" which limited the right of government employees to petition Congress and enjoined them from furnishing information to Congress.[13] A second involved certain regulations issued by the Postmaster General to prevent the unionization of post office employees.[14] Congress was also concerned about removals of employees, without the assignment of reasons, as a means of enforcing the above policies.[15] Such summary removals "for the good of the service" had been made possible by President Roosevelt's suspension, in 1905,[16] of earlier Executive Orders issued by Presidents McKinley and Roosevelt giving civil service employees virtually the same protection as is now provided by the Lloyd-LaFollette Act.[17] And although President Taft had restored the earlier removal procedure by his Executive Order of Decem-

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[13] For the texts of the "gag orders" see 48 Cong. Rec. 4513. For the pertinent debate see 48 Cong. Rec. 4493, 4513, 4653-4, 4656-7, 4738-9, 5080, 5157, 5201-2, 5207, 5214, 5223-4, 5235, 5501, 5625-7, 5633-8.

[14] 48 Cong. Rec. 9952-3, 10670-77, 10727-33, 10790-804, 11755-6.

[15] 48 Cong. Rec. 9952, 10675.

[16] Twenty-second Report of the Civil Service Commission, p. 71.

[17] See President McKinley's Executive Orders of July 27, 1897, 18th Report of the Civil Service Commission 282, and May 29, 1899, *id.*, 286; Civil Service Rule of March 20, 1903, issued by President Theodore Roosevelt, Rule XII, par. 2, 20th Report of the Civil Service Commission, p. 60.

ber 9, 1911,[18] Congress apparently considered that a statute abolishing the "gag rule" and giving employees the right to join organizations might be ineffective unless the statute also prohibited the removal of employees without assignment of reasons (cf. 48 Cong. Rec. 9952). Congress accordingly, with minor changes, gave statutory status to the Civil Service Rules establishing a procedure for the discharge of employees.

The Lloyd-LaFollette Act thus constitutes no more than the continuation of earlier Civil Service Rules on a statutory basis. And those Rules governing the actual discharge of employees by department heads did not and could not have any bearing upon the President's power to classify and except civil service positions. Indeed, on the very days that President McKinley issued his Orders imposing upon department heads a procedure for removals from office, he issued other Orders excepting large numbers of positions from the Civil Service.[19]

Under the construction placed upon the Lloyd-LaFollette Act by the court below, the Civil Service Rules, when they were given statutory form, expanded in scope and affected the classification powers of the President. As indicated above, there is nothing in the legislative history of the Act which would lend support to this theory.[20] There are additional, persuasive reasons for rejecting it.

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[18] For the text of the Order see 48 Cong. Rec. 5626.

[19] *The History of the Federal Civil Service*, pp. 72-73.

[20] It cannot be said that this expansion follows from a necessary implication on the ground that the Lloyd-LaFollette Act

Under R. S. 1753 (5 U. S. C. 631) the President, since 1871, has had the authority

> to prescribe such regulations for the admission of persons into the civil service of the United States as may best promote the efficiency thereof.

It was well established in 1912 that this statute conferred not merely the power to cover into the civil service but also to except positions previously covered into the civil service. See *supra*, p. 14, fn. 19; see also the statement of Rep. Gillett at 50 Cong. Rec. 5529. To hold that the Lloyd-LaFollette Act cut down the power to except, long exercised by successive Presidents, is to effect a repeal by implication, a result to be avoided in the absence of a "clear expression of that purpose by Congress." *U. S. Alkali Assn.* v. *United States*, 325 U.

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would be a dead letter if the President could help a department head to escape the limitation of the Act by excepting the position of an employee whose summary discharge is desired. This argument is not conclusive. First, there is a big difference between a routine discharge within a department and the invocation of Presidential aid. Congress may have felt that where the department head feels so strongly about an employee that he asks the President to except his position and the President accedes to his request the case has been scrutinized even more than under the procedure prescribed by the Act and that consequently the Presidential power need not be curbed. Second, Congress, although realizing that the President's power to except civil service positions constitutes a loophole, may have decided not to fill it for constitutional reasons (see *infra*, pp. 16-17).

The instant case obviously does not constitute a declassification with evasive purposes. Respondent's position was declassified in 1947; his discharge occurred six years later under another administration.

S. 196, 206; *Georgia* v. *Pennsylvania R. Co.*, 324 U. S. 439, 456-457; *United States* v. *Borden Co.*, 308 U. S. 188, 198-199; *Rosenberg* v. *United States*, 346 U. S. 273, 294 (concurring opinion of Mr. Justice Clark).[21]

Moreover, as we interpret the Lloyd-LaFollette Act, it merely limits the power of a department head to remove an inferior officer whom he has appointed. Congress has this authority. *United States* v. *Perkins*, 116 U. S. 483; *Myers* v. *United States*, 272 U. S. 52, 160-161. The Court of Appeals' construction modifies the President's authority to declassify civil service positions. The assumption that Congress has the power to impose limitations upon the President's "general administrative control of those executing the laws"[22] raises weighty constitutional problems and is by no means as "clear" as asserted in the opinion, *infra*, at p. 4A. See, *e.g.*, *Myers* v. *United States*, 272 U. S. 52, 164; *Humphrey's Executor* v. *United States*, 295 U. S. 602, 627-628.[23] A construction of a statute which raises doubts as to its constitutionality is to be avoided

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[21] In *U. S. ex rel. Palmer* v. *Lapp*, 244 Fed. 380, 383 (N.D. Ohio), affirmed, 244 Fed. 377 (C.A. 6), the District Court stated that the Lloyd-LaFollette Act constituted an amendment to the basic civil service legislation by creating a new prohibition against removals in addition to the ones contained in Section 13 of the Act of January 16, 1883 (22 Stat. 403, 407), establishing the Civil Service Commission; the court did not suggest that the Act had any bearing on the President's power to classify under the 1871 statute.

[22] *Myers* v. *United States*, 272 U. S. 52, 164.

[23] Cf. *Flemming* v. *Stahl*, 83 Fed. 940 (C.C. W.D. Ark.), showing how carefully the Civil Service legislation was drawn to avoid any invasion of the constitutional powers of the President in this field.

when, as here, there is a reasonable alternative construction. See, *e.g., Driscoll* v. *Edison Light and Power Co.,* 307 U. S. 104, 115; *Guessefeldt* v. *McGrath,* 342 U. S. 308, 319; *United States* v. *Rumely,* 345 U. S. 41, 47; *United States* v. *Five Gambling Devices,* 346 U. S. 441, 448-452 (opinion of Mr. Justice Jackson).

In any event, a statute will not be construed as seeking to curtail the President's authority in matters involving control of the employees of the executive department unless it uses "very clear and explicit language." [24] The Lloyd-LaFollette Act does not contain an express limitation on the President's power to classify and except positions. This limitation may be found only by way of implication, and as we have shown above (*supra,* pp. 14-15, fn. 20), the implication is by no means clear or necessary. [25]

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[24] *Myers* v. *United States,* 272 U. S. 52, 162-163, 164; *Shurtleff* v. *United States,* 189 U. S. 311, 315; *Blake* v. *United States,* 103 U. S. 227, 235-237; *Morgan* v. *Tennessee Valley Authority,* 115 F. 2d 990, 993 (C.A. 6), certiorari denied, 312 U. S. 701.

[25] Only a year after the passage of the Lloyd-LaFollette Act, Congress indicated during the debates attending the Urgent Deficiency Appropriations Act of 1913 (38 Stat. 208) that the Lloyd-LaFollette Act did not affect the President's power to except positions from the civil service. The 1913 Act contained a rider excepting deputy internal revenue commissioners and deputy marshals from the classified civil service (38 Stat. 208, 5 U. S. C. 639; cf. *United States ex rel. Palmer* v. *Lapp,* 244 Fed. 377 (C. A. 6)). Congressmen opposing the statute pointed out repeatedly that it was unnecessary since the President had the power to except positions from the competitive civil service (50 Cong. Rec. 5388, 5529, 5538, 5540, 5569). No member of Congress took the position that the newly-enacted Lloyd-LaFollette Act had curtailed

We submit, in brief, that the statutory language, the origin of the separation provisions, and fundamental principles of statutory construction support the view that the Lloyd-LaFollette Act relates solely to the authority of department heads to discharge an employee from his office, and that it does not have, and was not intended to have, any bearing upon the President's authority to classify and except civil service positions.[26]

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this authority of the President. The rider passed not because it was felt that otherwise these positions could not be exempted, but because it was feared that President Wilson would not exercise his authority to except.

[26] Respondent can draw no support from the fact that Congress eliminated from the Department of Justice Appropriations Bill, 1954, a rider which would have explicitly authorized the Attorney General to terminate the employment of any officer or employee, notwithstanding the Lloyd-LaFollette Act or any other law. Cf. H. Rep. 341, 83d Cong., 1st Sess., p. 19. The Congressional debate shows that this action was taken for reasons which have no bearing on the problem at hand.

The main reasons for the elimination of the rider were, first, that its avowed purpose, the removal of "subversives and homosexuals," could be accomplished under the Act of August 26, 1950 (64 Stat. 476, 5 U. S. C. 22-1) and the recently issued Executive Order 10450 of April 27, 1953 (18 F. R. 2489) establishing the government employees' security program; second, that it jeopardized veterans' preference rights; and, finally, that it was not limited to professional employees, but covered clerical workers as well. 99 Cong. Rec. 4510-4514, 4517-4529, 4534-4543 (House); 5818-5828, 5833-5835, 5986-5990 (Senate). A Senate amendment offered by Senator Carlson which would have given the Attorney General the power summarily to remove employees in excepted positions was defeated on a point of order. The

2. *Executive Order 9830 removed respondent's position from the classified civil service and the protection of the Lloyd-LaFollette Act. The continued, non-statutory protection provided respondent by Section 6.1(f) of that Order was terminated by Executive Order 10463.*

The opinion below states (*infra*, at p. 3A), that "Order 9830 was apparently intended, when it was issued, not to apply to attorneys who, like Roth, were already in the classified civil service. Until the District Court decided this case, the Civil Service Commission interpreted the Order as not applying to these attorneys."

We submit that Executive Order 9830 excepted *all* attorneys' positions from the classified civil service and that it cannot be limited by interpretation to those positions occupied by non-status appointees or filled after the effective date of the order. Section 6.1(a) (*infra*, 7A-8A), plainly states that "the positions named in Schedules A and B, set out in § 6.4 * * * shall be excepted from the competitive service." The listing in Section 6.4

Senate refused to suspend the rule mainly because the measure would have destroyed veterans' preference rights. 99 Cong. Rec. 5986-5990. Thus, Senator Monroney, opposing the amendment, stated (*id.*, p. 5988):

> Any of the 310,000 in the excepted services can be fired today at the will of the Secretaries here involved, if they are not veterans. But if they are veterans they have a preference. The Carlson amendments would wipe out veterans' preference.

(*infra*, p. 9A) includes, without qualification "Attorneys."[27]

It is quite true that, subsequent to the issuance of Executive Order 9830 in 1947, respondent contined to enjoy protection against summary removal. But, in our view, he had that protection not by virtue of the Lloyd-LaFollette Act, which relates solely to removals from positions in the classified civil service, but solely by reason of Section 6.1(f) of the Order (*infra*, pp. 8A-9A), which stated:

> Whenever any position in Schedule A or B (§ 6.4) is occupied by a person having a competitive status, he shall be separated from such position only in accordance with the provisions of this order and the Civil Service Rules and Regulations.

In other words, the President, by Executive Order 9830, provided that certain persons in excepted positions would have protection similar to that enjoyed by the non-excepted (*i.e.*, those holding positions in the classified civil service) under provisions of the Lloyd-LaFollette Act and implementing rules and regulations. Only in this carefully limited sense is it correct to say that the Order "was apparently intended, when it was issued, not to apply to attorneys * * * like Roth * * *."

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[27] Analagous language in the Urgent Deficiencies Appropriation Act of 1913, declassifying deputy collectors and deputy marshals (see p. 17, fn. 25, *supra*), was held to be not merely prospective but, also, to affect incumbents with civil service status. *United States ex rel. Palmer* v. *Lapp*, 244 Fed. 380, 384 (N.D. Ohio), affirmed, 244 Fed. 377 (C.A. 6).

It is, of course, plain that the immunity from summary removal which the President conferred by Section 6.1(f) of Executive Order 9830 was terminable by the President at any time. It was in fact terminated, so far as persons in respondent's position are concerned, by the issuance of Executive Order 10463 (*infra*, p. 10A), which states:

> Except as may be required by the Veterans' Preference Act, the Civil Service Rules and Regulations shall not apply to removals from positions listed in Schedules A and C * * *.

As pointed out above, the unqualified language in Executive Order 9830 excepting attorney's positions negatives the suggestion that the order was not meant to apply to such positions when occupied by persons having civil service status. Indeed, the President, in issuing the order, must have interpreted it as removing the umbrella of the Lloyd-LaFollette Act from incumbents having civil service status; otherwise, there would have been no occasion to afford similar protection by promulgating Section 6.1(f). Moreover, the belief that the President's declassification powers were left unaffected by Lloyd-LaFollette was well established. That view, as noted above (p. 17, fn. 25) was reflected in Congressional debates, the session following the Act's passage. Moreover, in 1934, the Attorney General had issued a definitive ruling that the Act did not impair the President's authority to place positions in Schedule A and that

> the effect of such an order would be to take these positions out of the competitive classified

> civil service and place them among the class of positions which are excepted from competitive examination under the Civil Service Rules. The order would not deprive the occupants of the civil service status conferred upon them by Executive Order No. 5609, *but it would make their future service dependent upon the pleasure of the appointing officer.* [37 Op. A. G. 567, 569-570, italics supplied.] [28]

The position of the Civil Service Commission on the basic issue presented by this case has been ambiguous. Some of its pronouncements appear to rest on the premise that the protection of persons in respondent's position, subsequent to the 1947 declassification of attorneys, depended on Section 6.1(f) of Executive Order 9830. Others hold or appear to assume that protection continued to have a statutory basis. The Commission's present position accords with that of petitioners.

Following the issuance of Executive Order 9830, the Commission, by Departmental Circular No. 497, Supplements 2 and 3, dated April 15 and August 26, 1947, respectively (R. 39-41), advised the various department heads that no change should be made in the appointments of attorneys with competitive status. No reference is made to the Lloyd-

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[28] Similarly, 34 Op. A. G. 192 and 40 Op. A. G. 440 hold that the classification or exception of a position does not affect the incumbent's civil service status. These two opinions, however, do not deal with the question whether the Lloyd-LaFollette Act affected the President's plenary power to remove positions from the civil service.

LaFollette Act. Supplement No. 2 based the directive expressly on Section 6.1(f).

To our knowledge, Departmental Circular No. 694, dated December 12, 1952, was the first document to suggest that the Lloyd-LaFollette Act could protect persons holding excepted positions.[29] While letters of July 23, 1953, from the Chairman of the Civil Service Commission to the petitioner Rogers (R. 20-21) and of November 27, 1953, from the Executive Director of the Civil Service Commission to the respondent (R. 27-32) also take the position that the Lloyd-LaFollette Act conferred rights upon status employees which could not be affected by Executive Order, the Chairman of the Civil Service Commission had taken diametrically the opposite position in a letter addressed to the President. This letter, dated June 16, 1953, submitting proposed Executive Order 10463 to the President for his approval (R. 35), stated that

> * * * under the amendment the Civil Service Rules and Regulations will no longer apply to removals from positions listed in Schedule A of persons who have competitive status.

The Commission's most recent circular on the subject (Departmental Circular No. 744, March 3,

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[29] Departmental Circular No. 694 reads in pertinent part: * * * the rights of attorneys may be summarized briefly as follows: * * * Those nonveterans who were in attorney positions with competitive status before May 1, 1947 and have continued in attorney positions without a break in service are covered by the basic removal statute (the Lloyd-LaFollette Act of August 24, 1912).

1954, *infra*, pp. 11A-15A) states that the Lloyd-LaFollette Act does not apply to any excepted position.[30] Part 9 of the Civil Service Regulations, governing separations, has been amended accordingly (19 F. R. 1237).

CONCLUSION

The question at the root of this case—the relation of the Lloyd-LaFollette Act to the Presidential power to include or except positions from the civil service of the United States—is one of substantial public importance. The correctness of the decision below is, at the least, highly doubtful, and the matter is one which should be authoritatively determined by this Court. The petition for a writ of certiorari should be granted.

Respectfully submitted,

SIMON E. SOBELOFF,
Solicitor General.

SEPTEMBER 1954.

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[30] The Circular states in pertinent part: "*Removals.*—The Lloyd-LaFollette Act of 1912 and Part 9 of the Commission's Regulations do not apply to the incumbent of a position placed in Schedule A, B or C * * *."

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12126

LEO A. ROTH, APPELLANT

v.

HERBERT G. BROWNELL, JR., individually as The Attorney General of the United States, *et al.*, APPELLEES

Appeal from the United States District Court for the District of Columbia

Decided July 16, 1954

Mr. Herbert S. Thatcher, with whom *Messrs. J. Albert Woll, James A. Glenn,* and *James M. Fallon* were on the brief, for appellant.

Mr. Donald B. MacGuineas, Attorney, Department of Justice, of the bar of the Supreme Court of Illinois, *pro hac vice,* by special leave of Court, with whom *Mr. Paul A. Sweeney,* Attorney, Department of Justice, was on the brief, for appellees. *Mr. Edward H. Hickey,* Attorney, Department of Justice, entered an appearance for appellees.

Mr. Claude L. Dawson filed a brief on behalf of The Federal Employees Veterans Association, Inc., as *amicus curiae,* urging reversal.

Before EDGERTON, PRETTYMAN, and BAZELON, Circuit Judges.

EDGERTON, *Circuit Judge:* The plaintiff sued to be restored to a position, from which the defend-

ants had removed him, as Trial Attorney GS-14 in the Department of Justice. He appeals from an order of the District Court which granted the defendants' motion for summary judgment and dismissed the complaint. *Roth* v. *Brownell,* 117 F. Supp. 362.

Plaintiff was removed from his position, as of the close of business July 31, 1953, by a letter dated June 29, 1953. He had been given no notice that his removal was contemplated. He was given no reasons. He had served in various attorney positions in the executive departments since 1938. He had become a member of the classified civil service April 15, 1943, under the Ramspeck Act, 54 Stat. 1211, 5 U.S.C. 631a, b, and Executive Order 8743, April 23, 1941, 6 F.R. 2117. All this is undisputed.

The Lloyd-LaFollette Act, 37 Stat. 555 (1912), as amended, 62 Stat. 354 (1948), 5 U.S.C. 652(a), provides: "No person in the classified civil service of the United States shall be removed or suspended without pay therefrom except for such cause as will promote the efficiency of such service and for reasons given in writing. Any person whose removal or suspension without pay is sought shall (1) have notice of the same and of any charges preferred against him; (2) be furnished with a copy of such charges; (3) be allowed a reasonable time for filing a written answer to such charges, with affidavits; and (4) be furnished at the earliest practicable date with a written decision on such answer. . . ." The question is whether the plaintiff could be removed legally, as he was actually, without compliance with these requirements.

In 1947, when Roth had been in the classified civil service about four years, Executive Order No. 9830 was issued. It provides that the "positions named in Schedules A and B . . . shall be excepted from the competitive service. . . ." Schedule A includes attorneys. 12 F.R. 1259, 1263. It is agreed that "competitive service" and "classified civil service" are equivalent terms. But Order 9830 was apparently intended, when it was issued, not to apply to attorneys who, like Roth, were already in the classified civil service. Until the District Court decided this case, the Civil Service Commission interpreted Order 9830 as not applying to these attorneys.

The defendants assume, without directly asserting, that the plaintiff was not "removed" from the classified civil service in 1947 when Order 9830 "excepted" such "positions" as his from that service. But despite that assumption, the defendants say that by reason of Order 9830 the plaintiff ceased to be "in the classified civil service", with the result that he was not "removed" from it in 1953 either, and that there was therefore no need to comply with the Lloyd-LaFollette Act in removing him from the position he held in 1953. This is a paradox. Roth was once in the classified civil service, did not leave it voluntarily, and is now out of it. It follows that he was removed from it. We think he was removed from it in 1953. But whether he was removed from it in 1947 or in 1953 there was no compliance with the Lloyd-LaFollette Act. Neither the formula of "excepting" the kind of position a person holds, nor any other formula, can

obviate the requirement of the Lloyd-LaFollette Act that "No person in the classified civil service of the United States shall be removed . . . therefrom" without notice and reasons given in writing. The power of Congress thus to limit the President's otherwise plenary control over appointments and removals is clear.

It is immaterial here that the President has long been "authorized to prescribe such regulations for the *admission* of persons into the civil service of the United States as may best promote the efficiency thereof . . ." 16 Stat. 495, R.S. § 1753, 5 U.S.C. § 631. (Emphasis added.) Complete control over admissions does not obviate removal requirements of the Lloyd-LaFollette Act.

In our opinion the plaintiff is entitled to a summary judgment that his removal from his position was not in accordance with law and that he should be restored to the position.

Reversed.

[Stamp:] United States Court of Appeals for the District of Columbia Circuit. Filed July 15, 1954. Joseph W. Stewart, Clerk.

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

APRIL TERM, 1954

No. 12,126

LEO A. ROTH, APPELLANT

v.

HERBERT G. BROWNELL, JR., individually and as The Attorney General of the United States, et al., APPELLEES

Appeal from the United States District Court for the District of Columbia.

Before: Edgerton, Prettyman, and Bazelon, Circuit Judges.

JUDGMENT

This cause came on to be heard on the original record from the United States District Court for the District of Columbia, and was argued by counsel.

On consideration whereof, It is ordered and adjudged by this Court that the order of the said District Court appealed from in this cause be, and the same is hereby, reversed, and that this cause be, and the same is hereby, remanded to the said District Court for further proceedings not inconsistent with the opinion of this Court.

Dated: July 16, 1954.

Per Curiam.

APPENDIX B

The Lloyd-LaFollette Act (Section 6 of the Postal Appropriations Act of 1912, 37 Stat. 555, as amended by the Act of June 10, 1948, 62 Stat. 354, 5 U. S. C. 652) provides in pertinent part:

> No person in the classified civil service of the United States shall be removed or suspended without pay therefrom except for such cause as will promote the efficiency of such service and for reasons given in writing. Any person whose removal or suspension without pay is sought shall (1) have notice of the same and of any charges preferred against him; (2) be furnished with a copy of such charges; (3) be allowed a reasonable time for filing a written answer to such charges, with affidavits; and (4) be furnished at the earliest practical date with a written decision on such answer. No examination of witnesses nor any trial or hearing shall be required except in the discretion of the *officer or employee directing the removal or suspension without pay.* Copies of the charges, the notice of hearing, the answer, the reasons for removal or suspension without pay, and the order of removal or suspension without pay shall be made a part of the records of the proper department or agency, as shall also the reasons for reduction

in grade or compensation; and copies of the same shall be furnished, upon request, to the person affected and to the Civil Service Commission. This subsection shall apply to a person within the purview of section 14 of the Veterans' Preference Act of 1944, as amended [section 863 of Title 5], only if he so elects. [Italics supplied.]

Executive Order 9830 of February 24, 1947, 12 F. R. 1259, provides in pertinent part:

RULE VI—EXCEPTIONS FROM THE COMPETITIVE SERVICE

§ 6.1 *Positions excepted from the competitive service.* (a) Because of their confidential or policy-determining character, or because it is not practical to make appointments thereto through competitive examination, the positions named in Schedules A and B, set out in § 6.4 of this Rule shall be excepted from the competitive service. The Commission may, upon the request of an agency, determine that similar positions also should be excepted from the competitive service. Upon publication in the FEDERAL REGISTER of its determination excepting such positions from the competitive service, appointment thereafter may be made to such positions in the same manner as under Schedules A and B (§ 6.4). At the end of each fiscal year the Commission shall submit

to the President for review a list of the positions which it has excepted from the competitive service under this section during such year.

(b) Appointments to positions in Schedule A (§ 6.4 (a)) may be made without examination by the Commission.

(c) Appointments to positions in Schedule B (§ 6.4(b)) shall be subject to such noncompetitive examination as the Commission may prescribe.

(d) Appointment under either Schedule A or B (§ 6.4) shall not confer a competitive status. Final decision as to whether the duties of a particular position are such that appointment to it is authorized under Schedule A or B (§ 6.4) shall rest with the Commission. The Commission, with the concurrence of the agency concerned, may revoke in whole or in part any paragraph of Schedule A or B (§ 6.4): *Provided,* That such revocation shall be published in the FEDERAL REGISTER.

(e) An appointing officer in his discretion may fill any position in Schedule A or B (§ 6.4) or any position excepted from the competitive service by statute in the same manner as competitive positions are filled.

(f) Whenever any position in Schedule A or B (§ 6.4) is occupied by a person having a competitive status, he shall be separated from such position only in accordance with the pro-

sions of this order and the Civil Service Rules and Regulations. Whenever any position excepted from the competitive service by statute is occupied by a person having a competitive status he shall not be entitled to the protection against separation provided by such Rules and Regulations.

§ 6.2 *Assignment of excepted employees.* Any person appointed without competitive examination to a position in Schedule A or B (§ 6.4), or to a position excepted from the competitive service by statute, shall not be assigned to the work of a position in the competitive service without prior approval of the Commission.

§ 6.3 *Requirements of the Veterans' Preference Act.* The regulations issued by the Commission pursuant to section 11 of the Veterans' Preference Act shall apply to positions listed in Schedule A and B (§ 6.4) and positions excepted from the competitive service by statute.

§ 6.4 *Lists of positions excepted from the competitive service*—(a) *Schedule* A. The following positions are those excepted from the competitive service to which appointments may be made without examination by the Commission, and constitute schedule A of the Civil Service Rules:

* * * * *

(iv) Attorneys.

* * * * *

Executive Order 10463 of June 25, 1953, 18 F.R. 3655, provides in pertinent part:

> Section 6.4 of Civil Service Rule VI, as amended by Executive Order No. 10440 of March 31, 1953, is hereby amended to read as follows:
>
> § 6.4 *Removal of incumbents of excepted positions.* Except as may be required by the Veterans' Preference Act, the Civil Service Rules and Regulations shall not apply to removals from positions listed in Schedules A and C or from positions excepted from the competitive service by statute. The Civil Service Rules and Regulations shall apply to removals from positions listed in Schedule B of persons who have competitive status, however they may have been or may be appointed.

APPENDIX C

DC 744(1)

UNITED STATES CIVIL SERVICE COMMISSION

Washington 25, D. C.

March 3, 1954

DEPARTMENTAL CIRCULAR No. 744

(Departmental Circular No. 694 and Supplements 2 and 3 to Departmental Circular No. 497 are revoked)

TO HEADS OF DEPARTMENTS AND INDEPENDENT ESTABLISHMENTS

SUBJECT: Rights of employees occupying positions at the time they are listed in Schedule A, B or C

Following the decision of the District Court of the United States for the District of Columbia in the case of Roth vs. Brownell, the Attorney General by letter dated December 24, 1953, rendered an opinion that the legal interpretations set out in Departmental Circular 497, Supplements 2 and 3 are erroneous. He concurred in the Court's decision as correctly interpreting the Act of August 24, 1912.

Accordingly those departmental circulars and Departmental Circular 694 of December 12, 1952, which adopted the same interpretations, are revoked.

The instructions given below cover removal and

retention rights of *all* employees whose positions are listed in Schedule A, B or C.

Incumbents Move Automatically with Positions

When a position is placed in Schedule A, B or C the incumbent automatically moves with his position into the excepted service as of the date of publication in the FEDERAL REGISTER.

If the employee does not wish to remain in the poistion or if the agency does not wish to retain him in the position after it is listed as excepted under Schedule A, B or C, the agency is urged to use its discretion to assign or appoint him to another position for which he meets all the requirements. Indefinite employees occupying positions moved from the competitive to the excepted service may be reassigned to positions in the competitive service under Section 7.106 of the Commission's regulations, except where authority to use that section of the regulations has been withdrawn by the Commission. Employees with competitive status may be assigned to other positions in accordance with Civil Service Regulation 8.

Removals

The Lloyd-LaFollette Act of 1912 and Part 9 of the Commission's Regulations do not apply to the incumbent of a position placed in Schedule A, B or C, except that an employee with competitive status whose position is placed in Schedule B retains removal protection under Part 9 of the Commission's regulations.

The Commission will apply these principles to

any pending and future appeals of non-veterans whose positions have been listed in Schedule A or C, alleging that they were removed in violation of the Lloyd-LaFollette Act of 1912 or Part 9 of the Commission's regulations.

The applicability of Section 14 of the Veterans' Preference Act is not affected by the placement of a position in Schedule A, B or C. An employee with such protection may be removed from his position or reduced in rank or compensation only in accordance with the procedures in Section 14 of the Veterans' Preference Act and Part 22 of the Commission's regulations.

Section 14 is applicable to veterans in excepted positions who have completed a year of current continuous service. Placement of the veteran's position in Schedule A, B or C does not constitute a break in service for purposes of Section 14 and Part 22 of the Commission's regulations.

Retention Rights

In the event of reduction in force, employees in excepted positions compete only with other employees in the same competitive level in the excepted service. Such employees have no *right* to be reassigned in reduction in force to positions in other competitive levels. The preceding provisions hereafter apply to employees with competitive status whose positions have been moved from the competitive to the excepted service; this change is effective with respect to any reduction in force notice issued on or after the date of this circular.

Preparation of Standard Form 50

When an incumbent's competitive or excepted position is placed in Schedule A, B or C, the agency will prepare a Standard Form 50 to record the change. The nature of action will be shown as "Conversion to Excepted Appointment" under the authority of the appropriate subsection of the Schedule. The effective date of the change will be the date of publication in the Federal Register of the inclusion of the position in Schedule A, B or C.

Where the Form 50 has not been prepared in accordance with these instructions, it should now be prepared showing the effective date as the date of publication in the Federal Register.

Federal Personnel Manual Changes

Appropriate instructions will be incorporated in the Federal Personnel Manual to reflect these changes.

Inquiries

Inquiries from agencies in the Metropolitan area of Washington, D. C., may be made to the Bureau of Departmental Operations, Appeals Examining Office; those relating to retention rights should be directed to Code 171, Extension 8808; those relating to removal protection to Extension 8803. Inquiries from agencies outside the Metropolitan area of Washington, D. C., may be made to the

appropriate regional or branch regional office of the Commission.

(S.) JOHN W. MACY, JR.,
Executive Director.

Distribution of Departmental Circulars No. 741, 742 and 743 was limited to Headquarters of agencies only.

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No. 10463, dated June 25, 1953, 18 F. R. 3655 ..... 2, 6

MISCELLANEOUS

Brief filed by Department of Justice, Respondents in Opposition to Grant of Writ of Certiorari in Dorothy Bailey, Petitioner, v. Seth Richardson, Supreme Court, October Term, 1950, No. 49 6

History of the Federal Civil Service (1940) 6

Sageser, The First Two Decades of the Pendelton Act 6

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Foulke, Fighting the Spoilsmen (1919) 6

Fish, The Civil Service and the Patronage (1905) 6

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48 Congressional Record, Part 6, 62nd Cong., pp. 5637, 5638 8

99 Cong. Record, Part 4, 83rd Cong., pp. 4512, 4513, 4514, 4527, 4542 10

99 Cong. Record, Part 5, 83rd Cong., pp. 5824-5834, 5975-5989, 5990 10

IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

NO. 328

HERBERT BROWNELL, JR., Individually as the Attorney General of the United States and WILLIAM P. ROGERS Individually as Deputy Attorney General of the United States, *Petitioners,*

v.

LEO A. ROTH

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR RESPONDENT IN OPPOSITION

Opinions Below

The memorandum decision of the United States District Court for the District of Columbia (R. 41-47) is reported at 117 F. Supp. 362. The opinion of the United States Court of Appeals for the District of Columbia Circuit (petitioner's brief, pp. 1A-5A) has not yet been reported.

Jurisdiction

The jurisdictional requisites are adequately set forth in the Petition.

Questions Presented

1. Whether the Lloyd-LaFollette Act, which provides that an employee in the classified civil service shall not be dismissed summarily, limits the power of the President to ex-

cept particular positions or types of positions from that service, where making an exception would effect a summary dismissal of an incumbent employee otherwise entitled to that Act's protections.

2. If not, whether the pertinent Executive Orders (No. 9830, February 24, 1947, and No. 10463, June 25, 1953) removed respondent from the classified civil service and made him subject to summary discharge.

Statutes and Regulations Involved

The statutes and regulations are adequately set forth in the Petition.

Statement

This litigation involves the status, under the Lloyd-La-Follette Act, of a government employee who, after approximately fifteen years continued service in the employ of the United States as an attorney, was severed from his position by a notice of summary dismissal. The case was presented on the pleadings under Motions for Summary Judgment. The following basic facts are not controverted; they appear in appellant's complaint (R. 2, et seq.).

The respondent, Leo A. Roth, was employed as an attorney by agencies of the United States Government continuously since 1938. Upon compliance with the Ramspeck Act, effective November 26, 1940, 54 Stat. 1211, 5 U.S.C. 631 a, b (cum. Supp.), and having met the requirements of Executive Order No. 8743, dated April 23, 1941, promulgated thereunder, including taking of a non-competitive examination, the respondent acquired a competitive civil service status as an attorney in a classified civil service position effective April 15, 1943. Respondent served as an attorney, in a non-confidential, non-policy determining capacity, with the Department of Justice (with the exception of two years' service as an attorney with the Office of Price Stabilization; such service, however, is immaterial to the issues herein) from April 17, 1943, to the time of his dismissal, July 31,

1953. During his entire service within the Department of Justice his performance ratings were "Excellent," except as of June 22, 1953, when, under a different rating system, he was rated "satisfactory." On June 29, 1953, without receiving any complaint concerning the performance of his duties and without any charges being preferred against him, respondent was served with a notice summarily dismissing him from his position in the Department of Justice, his services to terminate as of July 31, 1953. Following receipt of such notice, respondent processed an appeal through the Civil Service Commission which, on July 24, 1953, found that respondent was entitled to the removal protections contained in the Lloyd-LaFollette Act and directed his reinstatement. The Attorney General ignored such directive, and the present court proceedings were instituted after the Civil Service Commission had informed respondent that it could take no further action.

Proceedings Below

On August 25, 1953, respondent filed a complaint for declaratory judgment and for mandatory injunction in the Federal District Court for the District of Columbia (R. 2). The Department of Justice filed an answer to the complaint on October 22, 1953 (R. 22). Thereafter, on November 4, 1953, respondent filed a Motion for Summary Judgment (R. 26) and on November 16, 1953, a cross Motion for Summary Judgment was filed by the petitioners (R. 32). The court below denied the respondent's motion, dismissed his complaint and granted the motion of the petitioners for summary judgment (R. 41). An appeal was taken to the United States Court of Appeals for the District of Columbia (R. 47.) That Court unanimously reversed the decision of the District Court and held that E. O. 9830 was not intended to apply to attorneys who, like respondent Roth, at that time were already in the classified civil service, and that, in any event, the respondent was entitled to the protec-

tive provisions of the Lloyd-LaFollette Act, 37 Stat. 555 (1912), as amended, 62 Stat. 354 (1948), 5 U.S.C. 652(a). The Court further concluded that the respondent's removal from his position was not in accordance with law and that he should be restored to the position (Petition, App. 1A-4A). The Court held that the prohibitions contained in the Lloyd-LaFollette Act against summary removal of those who were employed in the classified civil service, as was Roth, were clear and explicit and permitted of no exceptions. The Court further held that, unless that Act was to become meaningless,

> "Neither the formula of 'excepting' the kind of position a person holds, nor any other formula, can obviate the requirement of the Lloyd-LaFollette Act that 'No person in the classified civil service of the United States shall be removed . . . therefrom' without notice and reasons given in writing. The power of Congress thus to limit the President's otherwise plenary control over appointments and removals is clear."

REASONS FOR DENIAL OF WRIT

1.

The Court of Appeals below correctly held that the Lloyd-Follette Act prevented the summary removal of persons such as Respondent Roth from the Classified Civil Service, either by the device of making "exceptions" in such service or otherwise. The power of the President to make such "exceptions" for appointive purposes is not here challenged.

This case presents no issue of sufficient importance, nor is there probable error in the decision of the Court of Appeals below such as to warrant review by this Court. The power of the President to make, for appointive purposes, various exceptions and classifications in the classified civil service, and to prescribe rules and regulations respecting admis-

sion thereto, is not here challenged or even involved. We are concerned here solely with the narrow question of the scope of the President's power to remove incumbents from governmental positions previously acquired and under which certain protections against summary removals had already vested under a law of Congress enacted specifically to provide such protections. That Act is the Lloyd-La-Follette Act of 1912 (37 Stat. 555, as amended in 1948, 62 Stat. 354, 5 U.S.C. 652(a)), which states clearly, without exception or qualification, that "No person in the classified civil service of the United States shall be removed or suspended without pay therefrom except for such cause as will promote the efficiency of such service and for reasons given in writing," and which further provides that any person whose removal is sought shall be entitled to notice of charges and opportunity to answer. The Lloyd-LaFollette Act is the sole Congressional enactment dealing with the subject of removals in the civil service field. The power of removal must be sharply distinguished, as petitioners fail to do, from the power to make exceptions or classifications in the civil service or to prescribe rules respecting admission thereto, which, as we shall see, are the subject of other and prior Congressional enactments and which are qualified by the 1912 Act.

The United States Court of Appeals for the District of Columbia—a Court recognized as particularly expert and qualified in the determination of the type of issues here involved—had no difficulty in unanimously deciding that the removal protections of the Lloyd-LaFollette Act could not be obviated by so simple a formula as reclassifying or excepting positions in the federal service, not for appointive purposes but to effect a summary removal of incumbents otherwise entitled to Lloyd-LaFollette procedures. We respectfully submit that the reasoning of that Court is irrefutable. Briefly stated, it is that the Congress in Lloyd-LaFollette has specifically forbidden, in language

generally directed,[1] the removal of federal employees who have acquired a position and status in the classified civil service without stating reasons or filing charges and giving opportunity for a reply. Respondent Roth had admittedly acquired that position and status in the classified civil service as of April 15, 1943, and admittedly had it at the time E.O. 9830, purporting to remove him, was promulgated in 1947. He continued to hold such status and position as an attorney both in June of 1953 when Executive Order 10463 was issued and in July of 1953 when he was summarily dismissed, unless E.O. 9830 can be said to remove him from his position and strip him of his Lloyd-LaFollette protections. However, to permit Lloyd-LaFollette to be bypassed by the simple expedient of reclassifying a position or making an exception, through executive or administrative dictate, would provide a device which could quickly and easily be used to eliminate the sole protection against arbitrary discharge which the non-veteran federal career employee has possessed since the 1912 Act. Accordingly, Roth must be held entitled to the removal protections prescribed by law if that law is to have any meaning or effect.

Petitioners attempt to minimize the purpose and scope of the Lloyd-LaFollette Act in their account of its legislative history, as set forth in their petition, pp. 13-14. We prefer another account of the history and purpose of that Act as

[1] The argument of petitioners (Petition, p. 12) that the command of the Act is addressed to the "officer or employee directing the removal," and that "the President is not an officer or employee of the United States," is so specious as to require answer only by reference to the express language of the Act. Even assuming (without admitting) that the President is not an officer or employee of the United States, the command of the Act broadly prohibits summary removals without any qualifications or reference to any person or class of persons to whom such command may or may not apply. The reference to "officers or employees" occurs not in the command portion of the Act but only in that portion dealing with removal procedures, with specific reference to the discretion to grant a hearing, which, of course, is a matter customarily left to a department head, and not to the President, for determination.

given by the Department of Justice in its brief[2] submitted to this Court in the case of *Bailey v. Richardson*, affirmed 341 U. S. 918. There, this Court was advised as follows:

> "Prior to the innovation of a classified Civil Service, practically all officers and employees were appointed and removed, advanced and demoted, on the basis of their political opinions and affiliations. The power to dispense public offices were deemed a perquisite of success at the polls. See United States Civil Service Commission. *History of the Federal Civil Service* (1941); Sageser, *The First Two Decades of the Pendelton Act; A Study of Civil Service Reform* (1935); Foulke, *Fighting the Spoilsmen* (1919); Fish, *The Civil Service and the Patronage* (1905). The abuses inherent in the periodic wholesale summary dismissal of incumbent employees for political reasons led to the enactment of the Civil Service Act of 1883. Act of January 16, 1883, 22 Stat. 403, 5 U.S.C. 632 et seq. But the only limitation placed upon the power to remove summarily was the prohibition of removal for failure to contribute to any political fund or to render any political service. 5 U.S.C. 633. To further the policy of that Act, however, President McKinley issued an Executive Order in 1897 prohibiting summary dismissals from positions subject to competitive examinations. Under the authority vested in him by R. S. 1753 he ordered that no removal should be made 'except for just cause and upon written charges filed with the head of the Department, or other appointing officer, and of which the accused shall have full notice, and an opportunity to make defense.' Executive Order No. 101, July 27, 1897, Eighteenth Annual Report of the United States Civil Service Commission (1902) p. 282. Despite the Presidential Order, removals for political reasons appear to have continued. Since the Order was not issued to implement any statute restricting the executive power of removal, it was held

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[2] Department of Justice Brief for Respondents, pp. 68-71, on Writ of Certiorari in the United States Court of Appeals for the District of Columbia Circuit, in *Dorothy Bailey, Petitioner v. Seth W. Richardson*, Supreme Court, October Term, 1950, No. 49.

not to be judicially enforceable. See *Page v. Moffett*, 85 Fed. 38 (C.C.D. N.J.); *Morgan v. Nunn*, 84 Fed. 551 (C.C.M.D. Tenn.); *Flemming v. Stahl*, 83 Fed. 940 (C.C.W.D. Ark.); *Carr v. Gordon*, 82 Fed. 373 (C.C.N.D. Ill.); *Taylor v. Kercheval*, 82 Fed. 597 (C.C.D. Ind.).

"Accordingly, in 1912, proponents of the merit system obtained the passage of the Lloyd-LaFollette Act which enacted into positive law the provisions of the earlier Order. Employees were given the right to be notified of the charges and to 'be allowed a reasonable time for personally answering the same in writing; and affidavits in support thereof. . . .'" • • • •

"That record of one hundred and sixty years is 'a page of history worth a volume of logic.' It is a history the writing of which was shared by the judiciary."

Examination of the legislative history of that Act indicates an overall purpose on the part of Congress to establish protections against arbitrary or summary removals in the federal civil service so that career personnel devoting their lives to government work would be afforded a security which might render such careers more attractive and which would, in turn, raise the caliber of that service. (Cong. Rec., Vol. 48, Part 6, 62nd Cong., pp. 5637, 5638.)

Petitioners (Petition, p. 15) deplore what they term a repeal by implication of the President's power to make exceptions in the classified civil service. While, as before stated, there is involved here no challenge to that power when exercised, as it normally would be, in connection with admission or appointments to the federal civil service, it should be noted that there is no specific statute conferring upon the President the power to make exceptions and no specific law expressly dealing with that power. Whatever rights or powers the President may have in respect to removals must be implied from his power to make admissions under R. S. 1753. It is, therefore, difficult to determine just what law or authorization is being repealed by implication. Congress has passed only four basic civil service statutes in this field, in none of which is the power to make exceptions

expressly prescribed, and only one of which deals with the subject of removals. In 1871, in what is generally referred to as R. S. 1753, the first Civil Service Act, Congress authorized the President "to prescribe such regulations for the admission of persons into the civil service of the United States as will best promote the efficiency thereof. . . ." (Rev. Stat. §1753, 5 U.S.C. §631.) In 1883 it authorized the appointment of a Civil Service Commission as an aid to the President in preparing rules for carrying into effect the plans for a classified civil service (22 Stat. 403, as amended, 5 U.S.C. §633). In 1940, under the Ramspeck Act previously referred to, it authorized the President "to cover into the classified civil service any offices or positions in or under an executive department, independent establishment or other agency of the Government. . . ." (60 Stat. §1352, 5 U.S.C. §631(a).) It is to be noted that these enactments refer only to the *admission or classification* of persons into the civil service. They contain *no* provisions respecting the *discharge* or *removal* of persons who have obtained a position in the classified civil service. Congress has spoken in this respect only in the Lloyd-LaFollette Act of 1912, and amended in 1948. In the 1948 amendment Congress added to and strengthened the protections of the Lloyd-LaFollette Act by prohibiting suspensions without pay except upon notice and opportunity to answer. (cf. 5 U.S.C.A. 652(b) Cum. Supp.) Since the Lloyd-LaFollette Act follows in point of time the 1871 and 1883 Acts, and since its 1948 amendment follows the 1940 enactment, that law must be considered as an exception to whatever power the President possesses to include or except positions from the classified civil service where such inclusion or exception operates as a removal, although it might be added, parenthetically, it would not affect the President's right to make exceptions or classifications for appointive or admission purposes. The case of *United States ex rel. Palmer v. Lapp*, 244 F. 377, is direct authority for this proposition. There, it was stated (p. 383):

> "The purpose of the act of 1912 was to change the existing law by restricting the discretionary power of superior officers in the matter of removals. It was designed to give greater security to those occupying subordinate positions, and thereby to improve the public service, by requiring that removals shall be for cause and after a hearing. . . . *The Act of 1912 is amendatory of the previous civil service law, adding thereto an additional section to remove a fault and better the then existing law.*" (Emphasis added.)

It is significant to note that the Executive Department, as well as members of Congress, as of recent date deemed the Lloyd-LaFollette Act a general bar to the summary dismissal of employees in the classified civil service, and the Executive Department felt it necessary to make application to Congress to provide specific exceptions to the broad Lloyd-LaFollette protections when it desired to obtain the power to summarily remove certain classes of federal civil servants. On May 5, 1953, the petitioner Attorney General sought legislation to amend the Lloyd-LaFollette Act which would enable him to terminate at will the employment of attorneys (debates on H. R. 4974, 83rd Cong., 1st Sess., 99 Cong. Rec. Part 4, pp. 4512-4542)). After floor debates, members of the House and Senate refused to amend the Lloyd-LaFollette Act to effectuate this purpose. (99 Cong. Rec. Part 4, pp. 4542 and Part 5, pp. 5989-5990)). The legislative debates in this connection evidence keen concern by Congress to protect the government employee who had acquired protective rights against summary removals. (See 99 Cong. Rec., Part 4, pp. 4513, 4514, 4527 and Part 5, pp. 5824-5834, 5975, 5989-5990.)

Petitioners apparently now challenge (Petition, p. 16), although they did not do so below, the right of Congress to impose limitations on the President's power to remove lower level federal employees in the administrative service. This Court many years ago considered and laid at rest the constitutional question thus posed. In *United States v. Perkins*, 115 U. S. 483, 484-5, (cited with approval in *Myers*

v. United States, 272 U. S. 52, at p. 160) this Court stated:

> "It is further urged that this restriction of the power of removal is an infringement upon the constitutional prerogative of the Executive, and so of no force, but absolutely void. Whether or not Congress can restrict the power of removal incident to the power of appointment to those officers who are appointed by the President by and with the advice and consent of the Senate under the authority of the Constitution (Article 2, Section 2) does not arise in this case and need not be considered. We have no doubt that when Congress by law vests the appointment of inferior officers in the heads of departments it may limit and restrict the power of removal as it deems best for the public interest. The constitutional authority in Congress to thus vest the appointment implies the authority to limit, restrict and regulate removal by such laws as Congress may enact in relation to the officers so appointed. The head of the department has no constitutional prerogative of appointment to offices independently of the legislation of Congress; and by such legislation he must be governed, not only in making appointments but in all that is incident thereto."

2.

The Court of Appeals below correctly held that Executive Order 9830 did not affect incumbents such as Roth holding classified positions but was a directive to department heads relating to power to make future appointments. Thus, no issue of Presidential powers to make "exceptions" in civil service is involved.

A final and very persuasive reason why this Writ should not be granted lies in the fact that this case can be disposed of, as it was by the Court of Appeals below, by a proper construction of Executive Order 9830 under which that Order would "except" subsequently appointed attorneys from the need for taking Civil Service examinations. Such a construction would make it unnecessary to inquire into the broader question of Presidential removal powers which are raised in the Petition herein. Petitioners have attempted to construe and apply that Order so as to make

it applicable to incumbents such as Roth who had already been appointed to and achieved a status in the Classified Civil Service. The Civil Service Commission, in a series of rulings issued prior to the Keech decision below, and the Court of Appeals in this case, have put a different construction upon that Order, and said that it has no application to previously appointed incumbents such as Roth. This construction would raise no question respecting the scope and application of the Lloyd-LaFollette Act and the effect of that Act on the Presidential power, however derived, to except particular positions or types of positions from the Classified Civil Service. As construed by the Court below and by the Civil Service Commission prior to the Keech decision,[3] E.O. 9830 amounts simply to a grant of permission to department heads that following promulgation of the Order they can make future appointments in the excepted classifications without the need for civil service examinations. The Order is set forth on page 7A of the Appendix of the petitioners. It is to be noted that prospective language is used throughout the Order and it has reference specifically to the power to make appointments which in itself suggests future, not retroactive application. The principal purpose of the Order was obviously to facilitate the subsequent acquisition of necessary personnel. To say that this Order was also designed to deprive persons of a civil service status is not only unreasonable and inconsistent with its overall purpose but would accomplish, in addition to an illegal result, a result that is both punitive and unnecessary when it is considered that the persons thus to be deprived of their protections have already been appointed and are performing satisfactory service in the necessary jobs.[4] The

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[3] Supplement 3 to Departmental Circular No. 497 (R. 40), Departmental Circular No. 694 (see Petition, p. 23, f. n. 29), and two rulings in the Roth matter as set forth at R. 12 and R. 20, 27.

[4] In response to petitioners' argument on page 21 of their Petition that it would have been unnecessary to specifically provide in Sec. 6.1(f) of E.O. 9830 that the Civil Service Rules and Regulations relating to removals were available to competitive status employees in Schedule A if, as we contend, the statutory protections were al-

construction placed upon the Order by the Civil Service Commission and the Court of Appeals below is consistent with common sense, and would reconcile that Order with applicable statutory law so that the question of presidential removal powers urged by Petitioner as reasons for granting this Writ would be eliminated.

Petitioners have raised various policy considerations, notably that the construction given by the Court below to the Lloyd-LaFollette Act and to E.O. 9830 would freeze Federal career employees in their positions and would bind the hands of succeeding administrations to remove civil servants who might for various reasons be unacceptable to the administration in power. Aside from the fact that there would be no such freezing because removal can always be accomplished for cause, the fact remains that Congress has spoken otherwise, and E.O. 9830 does not clearly command the termination of the Lloyd-LaFollette Act protections to Federal employees situated similarly to Roth but can be constructed consistently with what is direct Congressional mandate. Congress has deemed that to afford removal protections to the federal servant as a means of attracting qualified personnel to a civil service career and of insuring the federal government of the highest caliber of employees is more important than considerations of political expediency as they may arise from administration to administration. It is unfortunate at this particular time, with the Government reaching into all aspects of American life, and when it is of the utmost importance that we do have the highest possible caliber of persons attracted to federal employment, that the principal remaining protection to which the federal careerist, especially those who are not veterans, can look, namely, the Lloyd-LaFollette Act, is being challenged and minimized.

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ready there, the answer is that the Executive Order not only implemented the existing statute, but it was absolutely necessary to specifically provide protective measures to competitive status employees appointed *after* promulgation of E.O. 9830; otherwise the latter would have had no such removal protections, their positions having been excepted by E.O. 9830.

CONCLUSION

Respondent Roth, continuously employed since 1938 in an attorney position with the Federal Government, was admittedly at one stage of his career in the classified civil service and entitled to Lloyd-LaFollette Act protections. At another, without change in status or position he finds himself removed from that service by administrative dictate, through no fault of his own, without specification of charges, contrary to the procedures specifically prescribed in Lloyd-LaFollette. By what magic was this accomplished and how can the Lloyd-LaFollette Act have any efficacy if the contentions of the petitioners are to prevail? These questions remain unanswered in this case, and cannot be answered without reading Lloyd-LaFollette out of the books.

We respectfully submit that the decision of the Court of Appeals below is a correct one and that there is herein involved no issue of sufficient importance and no question of error such as to require review by this Court.

The Petition herein should be dismissed.

Respectfully submitted,

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